STATE OF MICHIGAN

COURT OF APPEALS

JAMES PATRICK RABY and KATRINA RABY,

Plaintiffs-Appellants,

v

BOARD OF TRUSTEES OF THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT and CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
March 17, 2011

No. 293570
Wayne Circuit Court
LC No. 08-016229-CK

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs, James Patrick Raby and his wife Katrina Raby, filed this action to contest the amount of James' retirement benefits following his resignation as a Detroit police officer, effective in December 2002. Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant Board of Trustees of the Police and Fire Retirement System of the City of Detroit (PFRS) with respect to plaintiffs' breach of contract and promissory estoppel claims, and granting summary disposition in favor of the city of Detroit with respect to plaintiffs' claim under the Employee Right to Know Act, MCL 423.501 *et seq.* Only the breach of contract and promissory estoppel claims against PFRS are at issue on appeal.[1] Because we conclude that the trial court made the right decision, albeit for the wrong reason, we affirm.

I. BACKGROUND

James was employed by the Detroit Police Department from March 1978 until December 2002, except for a layoff period between October 1979 and May 1985. James held the rank of

[1] As the city of Detroit observes in its brief on appeal, plaintiffs have not raised any issue challenging the dismissal of their Employee Right to Know Act claim, thereby abandoning that claim for purposes of this appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

sergeant at the time of his resignation on December 16, 2002. His employment was governed by a collective bargaining agreement, which expressly incorporated the PFRS pension plan in Title IX, Chapter VII, of the Detroit City Charter, but specified in article 50(B) that "the parties hereby agreed that said pension plan or any of its provisions may not be changed except in those areas which are administrative in their function and do not change the substantive benefits of the employees."

Article VI, part A, of the PFRS pension plan provides, in pertinent part, for a service retirement when an employee reaches 25 years of creditable service. Section 1(a) provides, in pertinent part:

> Any member as defined in article IV, section 1(a), (b), or (c) in service may file with the Board of Trustees his written application for retirement setting forth on what date not less than fifteen nor more than ninety days subsequent to the filing thereof, he desires to be retired; and provided the Board of Trustees shall determine that the member, at the date so specified or [sic] his retirement will have a total of twenty-five years or more of creditable service he shall on the date specified be retired, notwithstanding that during such period of notification he may have separated from service.

Section 4 establishes an early retirement plan known as the "40 & 8" plan and provides:

> Should any member who (1) has attained age forty years, and (2) has acquired eight or more years of credited service, leave the employ of the police department or fire department of the City of Detroit prior to the date he would have first become eligible to retire as provided in this part A, for any reason except his retirement or death, he shall be entitled to a retirement allowance computed according to section 2 or 2.1 of this article, whichever is applicable, as said section was in force as of the date of his employment with the city last terminated; provided, that he does not withdraw his accumulated contributions from the Annuity Savings Fund. His retirement allowance shall begin the first day of the calendar month next following the month in which his application for same is filed with the Board of Trustees, on or after the date he would have been eligible to retire had he continued in city employment. Unless otherwise provided in this chapter such person shall not receive service credit for the period of his absence from the City Police Department and/or Fire Department employ, nor shall he or his beneficiary, be entitled to any other benefit afforded in this chapter except the benefits provided in part A, section 2 or 2.1 or Part F of this article VI, whichever is applicable, subject to the above provisions, notwithstanding, his membership has terminated.

In addition, the retirement brochure provides:

> **Q. How do I apply for retirement?**
>
> **A.** To apply for retirement, follow these steps:

1) Contact your payroll or personnel department and determine your effective date of retirement.

2) Request an estimate from the Retirement System of your retirement allowance under the various options available.

3) Call the Retirement System to make an appointment for filing your application to retire.

4) Bring proof of birth date for yourself, and if Option II, Option A or Option III is chosen, proof of birth date for your beneficiary is also required. Police officers are also required to bring a "Resignation/Retirement Notification" letter obtained from their Personnel Department.

On November 8, 2002, James contacted PFRS to obtain a retirement estimate, "to find out if I retired as soon as I could whether my benefits would be greatly reduced from . . . [what] they would have been if I waited [three months] until . . . my 25th anniversary date." He spoke with Betty Lowe, a principal clerk with PFRS.[2] According to his testimony, "[Lowe] told me that my benefits would be minimally affected and that I would still have my medical." According to James, based on this information, he elected to retire and turned in his resignation letter.

James resigned from the Detroit Police Department by executing a "resignation/retirement notification" form on November 13, 2002. The form specified that James had resigned with the intent to claim "40&8" benefits, and contained James' acknowledgment that "I recognize that the submission of this notification is binding and that it may not be rescinded unless expressly approved by the chief of police."

On November 18, 2002, plaintiffs met with Lowe so that James could complete his retirement application. At the meeting, Lowe initially provided James with a written "Benefit Estimate" calculation that showed a monthly service pension payment of $2,257.54. However, later during the meeting, Lowe advised him that he was not, in fact, eligible for a service retirement, but only the "40&8" plan and that, therefore, his pension would be substantially less, i.e. only $1,422.47 per month and no health insurance. Accordingly, in a letter dated November 23, 2002, James requested that the police chief approve a rescission of his resignation. James explained that he wanted to continue employment until he obtained full retirement credits. He made a separate request to Lowe for her to stop processing his retirement application. Lowe abided by James' request until February 2004, when James requested that she submit his retirement papers because he was not successful in obtaining the rescission. At that time, James was paid retirement benefits retroactive to December 17, 2002.

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[2] Although Lowe has no recollection of this phone conversation, because this case comes before us on summary disposition, these facts are taken in the light most favorable to plaintiffs as the non-moving party.

On November 18, 2008, James and his wife filed this action against PFRS and the city of Detroit. Count I of their complaint alleged that PFRS breached its contractual obligation to pay correct retirement benefits to James. Count III alleged that PFRS was liable for greater benefits under a promissory estoppel theory because it made a promise or representation concerning benefits, upon which James relied to his detriment in making his retirement date effective December 17, 2002.[3] The trial court later granted PFRS's motion for summary disposition of the promissory estoppel and breach of contract claims.

II. STANDARD OF REVIEW

We review a trial court's summary disposition ruling de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). With respect to the factual merit of plaintiffs' promissory estoppel claim, review is appropriate under MCR 2.116(C)(10) because the trial court's decision was based on documentary evidence outside the pleadings. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on the substantively admissible evidence. MCR 2.116(G)(6); *Adair v Mich*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr*, 277 Mich App at, 56. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

III. ANALYSIS

Plaintiffs challenge the trial court's determination that the promissory estoppel claim was barred by the statute of limitations and argue that the trial court erred in determining that the breach of contract and promissory estoppel claims were based on the same subject matter.

A. MULTIPLE CLAIMS

Plaintiffs contend that both the breach of contract and promissory estoppel claims were actionable because they involved separate agreements and performances, but that, even if they concerned the same subject matter, plaintiffs were not required to choose between them because MCR 2.111(A)(2)(b) permits a party to pursue alternative theories of liability. We note that the trial court does not appear to have required plaintiffs to choose between their claims, but rather found that neither claim was actionable. That is, it found no breach of contract and concluded that the statute of limitations had run on the promissory estoppel claim. However, the trial court did make several statements that indicated it believed the promissory estoppel claim could not be brought separately. E.g., "[Y]our promissory estoppel claim is clearly not within the statute of

[3] Plaintiffs also alleged several additional claims that are not at issue in this appeal.

limitations . . . [a]nd that's assuming that you can have a promissory estoppel alongside a regular breach of contract."

Accordingly, we address this notion and hold that plaintiff is correct that both the promissory estoppel and breach of contract claims may be brought simultaneously. See *HJ Trucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573-574; 595 NW2d 176 (1999) (holding that under MCR 2.111(A)(2), a party can bring alternative counts of breach of contract and implied contract and have both submitted to the jury). The prohibition on having both claims only occurs when a court concludes that an enforceable contract exists and the performance that creates the consideration for the contract is the same performance that evidences detrimental reliance in a promissory estoppel claim. *General Aviation, Inc v Cessna Aircraft Co*, 915 F2d 1038, 1042 (CA 6, 1990). In the present case, it is clear that the performance that satisfied the detrimental reliance, i.e., James' early retirement, was different than the performance that represented consideration for the written contract, i.e, James' continued employment. Accordingly, assuming plaintiffs had been able to sustain their burden, they could have recovered under both theories.

We now turn to the trial court's conclusions regarding plaintiffs' breach of contract and promissory estoppel claims.

B. BREACH OF CONTRACT

As an initial matter, we disagree with plaintiffs' argument that the trial court's determination that there was no factual support for the breach the contract claim was "terse dicta." Obiter dictum has been defined as "1. an incidental remark or opinion. 2. a judicial opinion in a matter related but not essential to a case." *Allison*, 481 Mich at 437 (internal quotation omitted). "An issue that is intentionally addressed and decided is not dictum if the issue is germane to the controversy in the case, even if the issue was not necessarily decisive of the controversy in the case." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Whether there was factual support for a breach of contract claim was essential to the controversy in this case and the motion for summary disposition. The trial court's decision on that issue did not constitute dicta.

Further, plaintiffs failed to present sufficient argument, whether to the trial court or this Court, to explain why James is entitled to more service time than he was granted. Plaintiffs merely present the summarial statement that the time was improperly calculated and fail to address defendants' citation of Charter provisions that limit service time to time actually spent as a policeman and prohibit the inclusion of military service and layoff time. Consequently, we find no basis to overturn the trial court's determination that plaintiffs failed to factually support their breach of contract claim and affirm that decision.

C. PROMISSORY ESTOPPEL

Promissory estoppel is grounded in contract law, *Huhtala v Travelers Ins Co*, 401 Mich 118, 124; 257 NW2d 640 (1977), but constitutes an equitable doctrine, *Martin v East Lansing Sch Dist*, 193 Mich App 166, 178; 483 NW2d 656 (1992). As explained in *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008):

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Booker v Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002), rev'd in part on other grounds 469 Mich. 892, 668 N.W.2d 623 (2003). "'A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made.'" *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993) (citation omitted). The promise must be definite and clear, and the reliance on it must be reasonable. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993).

1. STATUTE OF LIMITATIONS

Plaintiffs allege that the trial court erred in concluding that their promissory estoppel claim was barred by the statute of limitations. We agree.

The parties all agree that there is a six-year statute of limitations on plaintiffs' promissory estoppel claim. See *Huhtala*, 401 Mich at 125. What the parties dispute is the date the period began to run. Plaintiffs allege that the clock did not begin to run until 2004, when the injustice occurred in the form of PFRS paying James the reduced benefits. Defendants argue that the statute of limitations began to run on November 13, 2002, when James relied on the alleged promise of increased pension benefits and signed his resignation notification. We disagree with both parties and conclude that the statute of limitations began to run on November 18, 2002, the date of the breach of the alleged promise.

In *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008), this Court held, "In general, 'a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract.'" This Court has generally taken an analogous approach with promissory estoppel claims such that the claim accrues when the promise is broken. See *Alliance Associates, LC v Alliance Shippers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2006 (Docket No. 265101) ("By analogy, a claim for promissory estoppel accrues when the promisor fails to perform the alleged promise."); *Borchers v Crawford Co*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2005 (Docket No. 260276) ("Because the November 12, 1985, resolution rescinded any benefits that had been promised plaintiff, plaintiff's claim accrued on November 12, 1985."). *Borchers* also involved an issue of retirement benefits where the benefits the plaintiff ultimately received were smaller than promised and the benefits were received long after the promise was rescinded. Accordingly, although the case is unpublished, its conclusion that the date the promised benefits are rescinded, rather than the date the reduced benefits are paid, is the date the claim accrues is extremely persuasive. Thus, we must determine, based on the facts in the record, when the alleged promise to James was rescinded.

The trial court held, "let's assume the promise in the light most favorable to you, let's assume the promise was made on November 8th. And let's assume that your client relied on it. And let's assume that he signed the Notice of Retirement/Resignation on November 13th in

reliance of this promise." For the purpose of determining whether the trial court properly concluded that the statute of limitations had run on plaintiffs' claim, we have accepted these assumptions. Thus, Lowe promised James the higher benefits on November 8 and James relied on that promise in signing the notice of resignation on November 13. The promise was not broken until November 18, when Lowe informed James that there was an error and that he would receive the reduced benefits. Because the promise was broken or rescinded on November 18, 2002, plaintiffs' promissory estoppel claim accrued on that date. Consequently, utilizing the trial court's assumptions, we conclude that it erred in holding that the complaint was not filed within the statute of limitations. When plaintiffs filed their complaint on November 18, 2008, the six-year statute of limitations had not yet expired. Accordingly, the trial court erred in granting summary disposition to defendants based on the running of the statute of limitations.

2. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Although we hold that the trial court erred in concluding that the promissory estoppel claim was barred by the statute of limitations, we nevertheless conclude that we must affirm the trial court's grant of summary disposition based on an alternate ground for affirmance—plaintiff's failure to meet the elements of the claim. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

The first requirement in a promissory estoppel claim is a promise. That promise must be "actual, clear, and definite." *First Security Savings Bank v Aitken*, 226 Mich App 291, 312; 573 NW2d 307 (1997), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). James' testimony regarding his November 8, 2002 telephone conversation with Lowe does not establish such a promise. James did testify that Lowe told him that if he retired prior to his 25th anniversary date his pension would only be minimally affected and that he would retain his medical benefits. However, no certain amounts were referenced and no "actual, clear and definite" promise, if any promise at all, was made in that conversation. Indeed, in his deposition, James testified that during the November 8 conversation, "[s]he promised me nothing."[4] Moreover, the written estimate of benefits on which James seeks to rely was not prepared or provided to him until November 18th. Since this was after his retirement, the receipt of that document cannot constitute the "promise" upon which James relied. Rather, the only event upon which he may assert detrimental reliance is the November 8 phone call which, as noted, he bluntly conceded contained no promise.

In sum, James' testimony precludes the November 8 conversation from containing the promise of increased benefits, and the alleged promises of November 18 cannot form the basis of a promissory estoppel claim because there is no reliance—the detrimental acts taken by James,

[4] We also note that James had previously received several pension estimates in writing all of which indicated that, under the "40&8" plan, his benefits would be substantially reduced.

i.e. his submission of his resignation, occurred prior to the promise and, therefore, cannot be said to have been made in reliance of it. Finally, although plaintiffs allege that they received, in writing, the estimate of higher benefits that James had been promised in the November 8 conversation, we can find no basis to conclude that this constituted a promise occurring prior to November 18 because the document provided to support this position is dated November 18, 2002. Consequently, we can find no evidence in the record of a promise occurring *prior* to James' submission of his resignation. Accordingly, plaintiffs' promissory estoppel claim must fail, as a matter of law.

Thus, the evidence in this case, viewed in a light most favorable to plaintiffs, establishes that the trial court reached the right result, albeit for the wrong reason, in granting summary disposition in favor of PFRS.

IV. CONCLUSION

We hold that plaintiffs were entitled to bring both a breach of contract and promissory estoppel claim and that the performance required under each claim was different to permit both claims to proceed. Nevertheless, we conclude that the trial court properly granted summary disposition to defendants because plaintiffs failed to present a factual basis for their breach of contract claim and, although the trial court erroneously determined that the promissory estoppel claim was barred by the statute of limitations, plaintiffs' failure to show any promise on which there was detrimental reliance created an alternate ground for affirmance.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro